IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LINDA CALL, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
vs.	)	**CIVIL NO. 01-717-GPM**
THE AMERITECH MANAGEMENT PENSION PLAN,	)	
Defendant.	)	

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

This matter is before the Court on Defendant's motion to dismiss (Doc. 48), Defendant's motion for summary judgment (Doc. 52), and Plaintiff's motion for summary judgment (Doc. 56). The Court held a hearing on September 15, 2003, and took the motions under advisement. For the reasons set forth below, Plaintiff's motion for summary judgment is granted, and Defendant's motions are denied.

BACKGROUND

This action involves a claim asserted under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1461. The class representative, Linda Call, was an employee of Ameritech Corporation from May 28, 1968, to November 30, 1999, and was a "participant" in the Ameritech Management Pension Plan ("the Plan") within the meaning of Section 3(7) of ERISA. When Ms. Call terminated her employment in November 1999, she elected to receive her Plan benefit as a lump sum distribution. The terms and provisions of the Plan as adopted and amended

were set forth in an instrument captioned "Ameritech Management Pension Plan (As Amended and Restated Effective as of May 1, 1995)" (the "AMPP95"). (*See* Exhibit A to Doc. 55.) Ms. Call was a "transition participant" and, therefore, entitled to a transition benefit (as those terms are defined in Supplement B to the AMPP95), because on May 1, 1995, she was within five years of being eligible for a service pension. As a transition participant, Ms. Call was entitled to a benefit in an amount equal to the greater of her transition benefit and her defined lump sum (DLS) benefit. On or about December 12, 1999, the Plan paid Ms. Call $219,312.14, which was the actuarial equivalent, determined in accordance with the "Eleventh Amendment" to the AMPP95, of the immediate annuity to which she was entitled under Section B-4 of Supplement B to the AMPP95. The parties agree that as a matter of arithmetic, the amount of the lump sum paid to Ms. Call was correctly computed under the terms of the Eleventh Amendment. However, if Ms. Call had retired on the day before the Eleventh Amendment was effective, the actuarial value of the B-4 immediate annuity she would have received using the 1983 Group Annuity Mortality ("83 GAM") table and the applicable Pension Benefit Guaranty Corporation ("PBGC") interest rates was $255,088.45.

The parties agree there is no statutory or regulatory impediment to what the Plan seeks – diminished lump sum transition benefit payouts – and that the contest turns on the Plan language. Excepted from this agreement is the effect of the May 1, 1995, amendment which the Court will take up first in its analysis. The destination is clear enough but the route is tortuous, so some background is required for sure navigation.

Ms. Call was a member of a class originally defined by this Court in the case of *Malloy v. Ameritech*, No. 98-CV-488-GPM (S.D. Ill. July 21, 2000). She was excluded from that class, however, after the Court amended the class definition on July 12, 2001. The Court entered summary

judgment in favor of a class of plan participants in the *Malloy* case, holding, *inter alia*, that the plan was required by its terms to use the PBGC interest rates for valuing lump sums and the 83 GAM table to value lump sum distributions made after January 1, 1994. *See Malloy v. Ameritech*, No. 98-CV-488-GPM (S.D. Ill. February 7, 2000).

On August 26, 2003, this Court certified a class pursuant to Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure defined as:

> **All participants in the Ameritech Management Pension Plan who qualified for a Transition Benefit, received a lump sum distribution of that Transition Benefit after July 1, 1999, and whose lump sum distribution was less than it would have been had 1) the participant resigned on the day of the Eleventh Amendment, and 2) his or her lump sum had been computed utilizing the interest rate used by the PBGC to value lump sums as of the year in which they received their distribution and the mortality table set out in Revenue Ruling 95-6 which is a blended table derived from the mortality table used by the PBGC for valuing annuities.**

The Court also at that time appointed Plaintiff Linda Call as class representative.

Ms. Call claims that the Plan administrator's application of Section 12.1 of the Plan is unlawful. That section provides:

> **Amendment. While it is expected that the Plan will be continued, either the Company or the Committee may terminate the Plan or amend the Plan from time to time subject to Supplement C; provided, however, that no amendment will reduce a Participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned from the employ of the Employers and Related Companies on the day of the amendment … and no amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.**

(AMPP95 – Exhibit A to Doc. 55, pp. 31-32.) This section was in effect before the adoption of the

Eleventh Amendment and the legislation which authorized the Eleventh Amendment. Specifically, Ms. Call argues that the Eleventh Amendment to the Plan, adopted July 1, 1999, cannot serve to provide her with a lump sum transition benefit less than what she would have received had she retired on the date the Eleventh Amendment became effective. Through this Amendment, the lump sum provisions of the Plan were amended. Lump sum distributions made after July 1, 1999, would be valued as the greater of the distribution produced by use of (1) the PBGC interest rates for valuing lump sums and the UP-1984 mortality table or (2) the interest rate on 30-year treasury bonds and the 83 GAM table. The Plan argues that the administrator's interpretation of Section 12.1 is not arbitrary and capricious and is, accordingly, lawful because the administrator is granted discretion to interpret the Plan language.

Ms. Call asserts that she and the members of the class should have received the lump sum distributions they would have received had they resigned before the Eleventh Amendment took effect, utilizing the factors this Court found were required in the *Malloy* case, that is, the 83 GAM table and the PBGC interest rates structure. The Plan argues that Ms. Call's payment was properly computed, and she was paid all she was entitled to receive.

ANALYSIS

Under the well-settled standard, summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Cox v. Acme Health Servs., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the nonmovant, a reasonable jury

could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant bears the burden of establishing that there exists no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant meets this burden, the nonmovant must set forth specific facts that demonstrate the existence of a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment against the party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and in which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. When, as here, cross-motions for summary judgment are filed, the Court looks to the burden of proof that each party would bear on an issue at trial and requires that party to go beyond the pleadings and affirmatively establish a genuine issue of material fact. *See Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). Interpretation of an ERISA plan "is a subject particularly suited to disposition by summary judgment." *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 419 (7th Cir. 1998) (citing *Metalex Corp. v. Uniden Corp.*, 863 F.2d 1331, 1333 (7th Cir. 1998)).

With respect to the motion to dismiss, the Court must take all allegations in the complaint to be true and view them, along with all reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). A motion to dismiss is properly granted only if it appears beyond doubt that a plaintiff is unable to prove any set of facts which would entitle him or her to relief. *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). When the issue is exhaustion of administrative remedies, the Court has discretion to require exhaustion before bringing suit under ERISA. *See Powell v. AT&T Comm., Inc.*, 938 F.2d 823, 825 (7th Cir. 1991).

Motion to Dismiss

Initially, the Plan seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Ms. Call has failed to exhaust her administrative remedies. (*See* Docs. 48-49.) Ms. Call alleges in her complaint that exhaustion would be futile, and she opposes the Plan's late attempt to dismiss her complaint on this basis. (*See* Doc. 82.) Exhaustion is not mandated by ERISA, *see Powell*, 938 F.2d at 825, and in the Seventh Circuit, it is commonly excused when it would be futile. *See, e.g., Gallegos v. Mt. Sinai Med. Ctr.*, 210 F.3d 803, 808 (7th Cir. 2000); *Smith v. Blue Cross & Blue Shield United of Wis.*, 959 F.2d 655, 658-59 (7th Cir. 1992).

Here, the motion to dismiss was not filed until the case was ripe for adjudication on the issue of liability. The Plan continues to deny that Ms. Call and the class she represents are entitled to more than they received – there is no reason to believe that their response would be any different if the claims were returned to the administrative level almost two and a half years after the action was filed. The Court finds that Ms. Call has shown that it is certain her claim would be denied, and the futility exception to the exhaustion requirement applies. *See Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1238 (7th Cir. 1997). Defendant's motion to dismiss is denied.

Motions for Summary Judgment

There are no factual disputes as to the liability issues; the only issue is whether Ameritech violated the literal terms of the Plan when it made the lump sum distribution to Ms. Call.

Ms. Call argues that if she had retired and requested a lump sum distribution of her retirement benefit before the Eleventh Amendment took effect, the Plan would have been required to compute the present value of her benefit by using (a) the PBGC interest rates, and (b) the 83 GAM table. If Ms. Call's lump sum benefit had been computed in this manner, it would have been

more than what she was actually paid.

This Court found in *Malloy* that the Plan's terms required use of the PBGC interest rates for valuing lump sums and the 83 GAM table. According to Ameritech, *Malloy* is inapplicable because it involved an earlier version of the Plan and not the Plan in effect just before the adoption of the Eleventh Amendment.

Insofar as the May 1, 1995, amendment purports to use something other than the PBGC interest rates and the 83 GAM table, it is unlawful and, thus, ineffective. Ms. Call argues that this Court's order in *Malloy* collaterally estops the Plan from relitigating the issue of the proper interest rates. There is no reason to analyze the merits of this argument, because the result is unavoidably the same.

The Retirement Protection Act of 1994 (the "RPA"), which became effective December 8, 1994, authorizes in certain cases the use of the interest rate on 30-year U.S. Treasury securities rather than the PBGC rates and the 83 GAM tables. But to avail itself of this option, the Plan had to be amended to embrace the so-called GATT (General Agreement on Tariffs and Trade) assumptions – which did not happen until its adoption of the Eleventh Amendment. So, if Ms. Call had retired the day before the Eleventh Amendment took effect, she was entitled to receive $255,088.45 rather than the $219,312.14 she received later that year. The question is whether the larger sum is an "accrued benefit" protected by Section 12.1 of the Plan.

The parties agree that the Eleventh Amendment which expressly adopted the GATT assumptions was specifically excepted from the Internal Revenue Code's anti-cutback rules. *See* 26 U.S.C. § 411(d)(6). Section 12.1 of the Plan could have been amended along with the Eleventh Amendment to reduce lump sum payouts to the extent of the actuarial assumptions authorized by

the RPA. But Section 12.1 was not amended, and as far as the Court knows, it is to this day a part of the Plan.

The jargon of ERISA is foreign to the larger culture. It is more akin to a code that only tutored experts can decipher. In this specialized realm, when pension experts use technical words like "accrued benefit" and the like, those words have special meaning and significance. *See Hickey v. Chicago Truck Drivers, Helpers, and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992) ("The term 'accrued benefit' has a statutory meaning, and the parties cannot change that meaning by simply labeling certain benefits as 'accrued benefits' . . ."). There is not much room for ambiguity and interpretation – this is not like a case where a person could reasonably argue that a "Cosmo" means a magazine instead of a popular cocktail.

Ms. Call's argument is simple. She does not claim she was deprived of an optional form of benefit. Instead, she argues that the actuarial assumptions used to calculate her lump sum distribution were a part of her "accrued benefit." In this regard she cites Revenue Ruling 81-12 (*see* 1981 WL 165942), certain Treasury Regulations, and 26 U.S.C. § 411(d)(6), the so-called "anti-cutback" rule. The Plan argues that the lump sum distribution that Ms. Call received is an optional form of benefit and not an accrued benefit. According to the Plan, § 411(d)(6) only provides that reducing early retirement subsidies or eliminating optional forms of benefit shall be <u>treated</u> as reducing accrued benefits. Admittedly, there is a distinction between treating something as if it were something else and expressly stating that the things are one and the same. But does this distinction really make a difference? In light of Revenue Ruling 81-12 and Regulation 1.411(d)-3, it does not. *See* 26 C.F.R. § 1.411(d)-3 ("Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to . . . actuarial factors for determining optional or early retirement

benefits.") Actuarial assumptions are part of the "accrued benefit," and whether the benefit is taken as an annuity or lump sum makes no difference for ERISA purposes.

At the conclusion of the hearing on this matter, counsel for the Plan was asked to explain why the term "accrued benefit" as used in Section 12.1 of the Plan did not carry the actuarial assumptions as it does for purposes of Internal Revenue Code § 411(d)(6). The answer was couched in terms of the Plan administrator's discretion to interpret the Plan. The discretion is purportedly triggered by the inclusion of the term "optional form of benefit" which is also found in Section 12.1. The idea is that this section specifically authorizes the elimination of an optional form of benefit in certain instances; namely, when "otherwise permitted by law and applicable regulation." Again, the exact language provides:

> **No amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.**

("AMPP95" – Exhibit A to Doc. 55, p. 32.) At this point, the Plan's argument collapses.

There is nothing in Section 12.1 of the Plan that even arguably implies that Ms. Call's lump sum distribution was not an accrued benefit. It is true that in certain instances, an optional form of benefit can be completely eliminated. But that possibility was not even implicated in this case. Ms. Call's right to take her accrued benefit in a lump sum is not challenged. She took her pension as a lump sum by choice on her part, not by grace on the part of the Plan. Moreover, insofar as the language "otherwise permitted by law" is concerned, the RPA provides only that adoption of the GATT actuarial assumptions will not work to constitute a violation of the anti-cutback provisions of 411(d)(6). There is no law or regulation that authorizes the Plan to restrict Ms. Call's right to take her pension in a lump sum. And, it is abundantly clear that the words "otherwise permitted by law"

refer only to the term "optional form of benefit;" these words do not in any way qualify the term "accrued benefit" which is found in the immediately preceding independent clause. Section 12.1 could have been drafted to take advantage of the GATT actuarial assumptions, in which event Ms. Call would have had to be satisfied with what she actually received; but that never happened and the Plan now will have to come through with what it promised.

Section 12.1 of the AMPP95 is clear and unambiguous. The Plan administrator does not have the discretion to interpret the term "accrued benefit" so that it does not carry the actuarial assumptions that it does in the rest of the ERISA world in this type of situation. There is nothing in Section 12.1 that attenuates the express promise that a participant's accrued benefit will not be diminished by future Plan amendments. There is no law or regulation that sanctions the elimination of Ms. Call's right to take her accrued benefit as a lump sum. The argument that when Ms. Call exercised her option to take her pension in the immediate annuity form of a transition benefit it was no longer protected as an "accrued benefit" is wholly without merit.

CONCLUSION

In light of the foregoing, Plaintiff's motion for summary judgment (Doc. 56) is **GRANTED**, and Defendant's motion for summary judgment (Doc. 52) is **DENIED**. Likewise, Defendant's motion to dismiss (Doc. 48) is **DENIED**.

IT IS SO ORDERED.

DATED this 10th day of March, 2004.

s/ G. Patrick Murphy
G. PATRICK MURPHY
Chief United States District Judge